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Introduction

1.1 Sharia and the nation state

The modern alternative banking and financial system, known as Islamic finance, caters to the religious conscience of Muslims by creating modern financial products that are premised upon the principles and commercial rules of the sharia or Islamic law.[1] Yet the sharia is no longer the sovereign law of most countries in the Muslim world.[2] By the end of the nineteenth century Muslim rulers had almost wholly discarded it throughout Muslim territories.[3] Traditionally, lawmaking authority in sharia legal systems presided with the class of jurists known as the *'ulemā'*, who sought to determine what God's law was on the basis of the Quran and Sunna. The Muslim ruler or caliph oversaw the enforcement of the law and the administration of the polity. Theoretically, the state was careful not to overstep the limits assigned to this role.[4] By the mid-nineteenth century, however, this *modus vivendi* had come to an abrupt end. Modernity and demands for social change had undermined the *'ulemā's'* authority and the state assumed the power to determine all the enacted laws of its sovereign territory.[5] This led to an unprecedented transformation in the relationship between the state and the jurists as the hitherto exclusive repository of legal authority.

[1] I use the term 'classical' to denote the long period stretching from the first Quranic revelations in 623 CE until the early nineteenth century when Islamic law was displaced by Western-based legal systems. The term 'medieval' has been avoided as it generally refers to a European periodisation of history.
[2] Saudi Arabia is the sole exception.
[3] See Wael B. Hallaq, *Shari'a: Theory, Practice, Transformations* (Cambridge University Press, 2009), 443.
[4] Joseph Schacht, 'Problems of Modern Islamic Legislation' (1960) 12 *Studia Islamica*, 113.
[5] Ann Elizabeth Mayer, 'The Shari'ah: A Methodology or a Body of Substantive Rules?' in Nicholas Heer (ed.) *Islamic Law and Jurisprudence* (University of Washington Press, 1990), 182.

The rise of the nation state, inextricably linked with the development of European imperialism, came to be felt throughout the entire Muslim world. Some European legal orders were superimposed upon traditional legal systems. For example, in British colonial territories English common law was imported as the supreme law and yet it continued to recognise traditional norms and institutions within its own legal structure.[6] In British India this situation is said to have created an independent legal system known as Anglo-Muhammadan law, which was substantially different from classical Islamic law, but comprised elements of each legal system.[7]

Other aspects of this epochal transformation involved sheer European military, political, economic and scientific might, which by the nineteenth century had become so dominant that the then Ottoman Empire instigated a series of rapid reforms known as the *tanzimat* to strengthen its relative position.[8] The *tanzimat* included wide-sweeping reforms in both civil and criminal law. For example, the Ottomans promulgated a Commercial Code in 1850, a penal code in 1858, a Code of Commercial Procedure in 1861 and a Code of Maritime Commerce in 1863. All of these were almost entirely based on French law.[9]

In the Middle East the introduction of these codes was seen as the abandonment of any pretence of adhering to Islamic law and a concerted secular drive to import Western-made law.[10] In 1877 the last of the *tanzimat* reforms, the Mejelle,[11] was billed as a civil code, encompassing nearly all areas of private Hanafī Islamic law except family law.[12] The Mejelle paved the way for a broader effort to codify Islamic law throughout the Muslim world.[13] Yet even before efforts had commenced to codify highly circumscribed areas of Islamic law, the adoption of European legal codes

[6] Gordon R. Woodman, 'The Idea of Legal Pluralism' in Baudouin Dupret, Maurits Berger and Laila al-Zwaini (eds.), *Legal Pluralism in the Arab World* (The Hague: Kluwer Law International, 1999), 8.
[7] Joseph Schacht (n 4) 112.
[8] Albert Hourani, *The Emergence of the Modern Middle East* (London: Macmillan Press in association with St Antony's College, Oxford, 1981), 14.
[9] *Ibid*., 385; and James Norman Dalrymple Anderson, *Islamic Law in the Modern World* (London: Stevens & Sons Limited, 1959), 21–4.
[10] Ann Elizabeth Mayer (n 5) 181.
[11] Turkey, '*The Mejelle, Being an English Translation of Majallah el-Ahkam-i-Adliya and a Complete Code of Islamic Civil Law*' (Lahore: Law Publishing Company, 1967).
[12] Haider Ala Hamoudi, 'The Death of Islamic Law' (2010) 38 *Ga.J.Int'l.& Comp.L.*, 308.
[13] *Ibid*., 306.

had the cumulative effect of dismantling the sharia legal system and with it the social fabric of lands under Ottoman rule.[14]

This historical background informs the contemporary position of the sharia in the legal systems of nation states. Among contemporary Muslim-majority states Saudi Arabia is the only one in which the sharia has not been wholly displaced by the introduction of European legal codes.[15] This is due to three key facts: Saudi Arabia was the country least affected by European colonialism; it hosts the two holiest cities of Islam – Mecca and Medina; and it largely subscribes to an ultra-conservative strain of Sunni Islam known as Wahhabism.[16] In 1992 Saudi Arabia did enact a Basic Law of Governance, a constitution of sorts, in response to political pressure.[17] The Basic Law declares in Article 1 that the constitution of the country is the Quran and the Sunna of the Prophet Muhammad. Moreover, the Saudi monarchy claims a traditional hereditary right to rule the country from the Quran and Sunna in Article 7 and sees its role as the guardian of the two holy mosques (Article 24), as well as the enforcer of sharia (Article 23).[18] However, even Saudi Arabia has enacted a parallel body of secular law, which it conveniently refers to as 'regulations' (*nizām*) so as not to offend its conservative religious elements. Commercial matters dealing with banking, companies, intellectual property and capital markets are all governed by modern regulations. Although subject to the Board of Grievances, whose judges are trained in Ḥanbalī *fiqh* (Islamic jurisprudence), disputes in these commercial areas are usually settled by separate, specialist dispute resolution bodies outside the jurisdiction of the sharia courts.[19] In fact, many, if not most, financial institutions conduct purely conventional transactions despite the fact that aspects of these

[14] Nicholas H. D. Foster, 'Using Comparative Commercial Law in the Study of Legal Transformation: Commercial Aspects of the Early Stages of Ottoman Legal Transition' in Ron Shaham and Aharon Layish (eds.), *Islamic Law Facing the Challenges of the 21st Century* (The Van Leer Jerusalem Institute, 2011), 14–15.

[15] Ann Elizabeth Mayer (n 5) 181.

[16] Peter D. Sloane, 'The Status of Islamic Law in the Modern Commercial World' (1988) 22 *Int'l L.*, 743, 751.

[17] See Kingdom of Saudi Arabia, 'The Basic Law of Governance' (Saudi Embassy, Ministry of Affairs, 1 March 1992).

[18] For an interesting examination of the development of the Saudi legal system, see Abdulaziz H. Al-Fahad, 'Ornamental Constitutionalism: The Saudi Basic Law of Governance' (2005) 30 *Yale J.Int'l L.* 375.

[19] Esther Van Eijk, 'Sharia and National Law in Saudi Arabia' in J. M. Otto (ed.), *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden University Press, 2010), 167.

may conflict with the sharia.[20] If found to conflict with the sharia, these transactions and the secular regulations that govern them would almost certainly be overturned in a sharia court, thus confirming the holy law's spiritual ascendancy in the kingdom.[21]

Other states including Iran, Pakistan, Sudan, Afghanistan, the northern states of Nigeria[22] and to some extent Libya, have re-islamised their legal systems by introducing Islamic law codes to their previous Western-derived systems after Islamists came to power.[23] The influence of the sharia in almost all Muslim-majority jurisdictions, however, is not usually dominant, clearly defined or consistent. For example, Middle Eastern states such as Kuwait, Bahrain and the United Arab Emirates (UAE) cite the sharia as 'a' source of their constitutions, whereas Qatar and Egypt designate the sharia as 'the' source.[24] Yet these states' legal systems comprise a secular mixture of western-style civil or common law with only a highly circumscribed role for the sharia in family, inheritance and personal status matters. Even in those areas of law where the influence of the sharia is still felt, it has been modernised in ways that clearly distinguish it from classical Islamic law.[25]

As a result, there is considerable uncertainty surrounding what role the sharia will play in solving a legal problem, let alone a commercial one, which generally requires a high degree of certainty, transparency and uniformity. Whereas the sharia may not impact upon a commercial dispute tried in Kuwait (for reasons associated with the principles of its Civil Code) and the sharia plays a prominent role in Saudi Arabia, other juris-

[20] Frank E. Vogel and Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Kluwer Law International, 1998), 12.

[21] William Ballantyne, *Commercial Law in the Arab Middle East: The Gulf States* (London: Lloyd's of London Press, 1986), 46.

[22] Olaf Koendgen, 'Shari'a and National Law in the Sudan' in J M Otto (ed.), *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden University Press, 2010), 221.

[23] Rudolph Peters, 'From Jurists' Law to Statute Law or What Happens When the Shari'a Is Codified' in B A Robertson (ed.), *Shaping the Current Islamic Reformation* (London: Frank Cass, 2003), 92.

[24] *Ibid.*, 49. According to Egypt's provisional constitution. See Constitutional Declaration of the Supreme Council of the Armed Forces (Almajlis al-Ala Lil-quwwat Almussallaha Yasdaru Al-iilaan Aldustoori) [Egy const.] of March 30, 2011, Art. 2 http://egyptelections.carnegieendowment.org/2011/04/01/supreme-council-of-the-armed-forces-constitutional-announcement. Accessed 24 March 2014.

[25] Joseph Schacht (n 4) 114.

dictions range in the degree of uncertainty somewhere between these two extremes.[26]

Reflecting this reality, legal practitioners of Islamic finance almost never use the sharia as the governing law of Islamic financial contracts unless they choose Saudi law. And even Saudi sharia law (Ḥanbalī *fiqh*) is not viewed by legal practitioners as an advantageous governing law because it is commercially disadvantageous as compared to secular legal systems.[27] In fact, English law and New York law are the legal systems most often chosen to govern Islamic financial transactions for the reason that they comprise systems of well-developed jurisprudence, objectivity and a history of upholding parties' contractual interests.

Furthermore, Islamic financial transactions, which entail legal structures that differ from conventional transactions, in practice almost always depend upon secular municipal legal systems for their facilitation.[28] This requirement has led interested states to undertake legislative and regulatory reforms so as to integrate the industry into their municipal legal frameworks. Indeed, most states have chosen the path of integration, while a select few have created dual or industry-specific financial systems (Malaysia, Bahrain and Brunei). Others have attempted to completely transform their financial systems into Islamic ones (Iran, Pakistan and the Sudan).

In every mode of facilitation mentioned above the modern state's authority to determine the law has significantly changed the Islamic legal substance of transactions given effect in municipal legal jurisdictions. This may be partly attributable to the effects of codifying Islamic law, which many learned scholars have long considered as distorting.[29] The much more important aspect of this change, however, involves the simple fact that Islamic law, in particular rules concerning commerce, has not been a functioning legal system for over 150 years. The reintroduction of Islamic law in a highly globalised world economy is thus not only revolutionary but subject to a whole host of structural forces that have

[26] *Ibid*.

[27] See *National Group for Communications and Computers* v. *Lucent Technologies Intl*., No. 00-86 (JLL), 2004 WL 1825228 (D.N.J. Mar. 21, 2004) in which a US District Court applied the Saudi version of the sharia, which led to a disadvantageous commercial outcome.

[28] A municipal legal system is the law of a jurisdiction or area in which a legal system is operative, e.g. England and Wales, France and New York state. Terms such as 'national law' are defective, as they do not take account of the fact that many nation states such as the United Kingdom and the United States are divided into various jurisdictions.

[29] See, for example, Joseph Schacht (n 4).

no classical example and now determine both the substance and letter of the law. The globalisation of commercial law indicates that the analysis of Islamic law in modern financial markets cannot be reduced to the study of the jurists' law or the discourse among Islamic jurists (*fuquhā'*). To do so would deprive the analysis of the most important factors relating to causation and effect. An analysis rooted in the objective examination of context must approach the law of Islamic finance (IFL), as well as other non-national normative systems, as the product of the global context in which it is conceived and practised. This includes its formulation and implementation by investment banks, accountancy firms, multinational law firms, sharia consultancies, nation states, regulatory authorities, international Islamic non-governmental organisations (IINGOs) and other market practitioners.[30]

1.2 The globalisation of commercial law

Three principal characteristics of modernity exert significant influence over traditional societies. Taken together, these characteristics have a major impact on the nature and design of global commercial law, including the modern variant known as Islamic financial law. First, modernity has set in motion an unprecedented pace of social change, which has rapidly increased with the development of new technologies. Second, the global scope of this change is unparalleled as it draws the most far-flung areas of the world together in hitherto unimaginable ways. Third, aspects of this change have generated wholly novel institutions such as the nation state, the corporation, and the specialisation of production and knowledge.[31]

Globalisation as a broader concept embodies these aspects of modernity, but evidences an unprecedented shrinking of time and space, which modern technologies continue to make possible with increasing speed. This means that social activity can be dis-embedded from particular contexts and times, so that 'manifold possibilities of change' arise in contexts where customary usages and local habits have been relatively closed-off from outside influences.[32] Technologies minimise distances and allow

[30] Kilian Bälz, 'Sharia Risk? How Islamic Finance Has Transformed Islamic Contract Law' (Occasional Publications no. 9, Islamic Legal Studies Program, Harvard Law School, September 2008) 3, www.law.harvard.edu/programs/ilsp/publications/balz.pdf. Accessed 25 March 2014.

[31] Anthony Giddens, *The Consequences of Modernity* (Stanford: Polity Press, 1990), 6.

[32] *Ibid*., 20.

instantaneous communication with people around the world.[33] And yet the concept of globalisation is more systematic, comprehensive and methodologically useful than the mere notion that the world is becoming more interconnected.[34]

One of the most important ways in which globalisation has made itself felt is in the activities of transnational corporations and other transnational actors.[35] Transnational actors' dealings beyond the borders of the nation state have provoked a lively debate concerning the sovereign authority of the nation state in the globalised economy. It is argued that the global reach of economic activity including regional and global systems of trade has undermined the state's authority, which is socially and territorially delimited.[36] But, in fact, the state is one of the most crucial actors in the global economy. So as to secure and maintain sovereign power, states actively participate in the implementation of the global economy and in doing so have undergone considerable transformations. These transformations take place in the negotiations between states, transnational corporations and foreign investors in which states accommodate the interests of these actors. The promulgation of law and regulations, and the enforcement of foreign judgments and arbitral awards are the means by which municipal legal systems accommodate the needs of global capital within their national territories.[37]

The nature of the globalised economy should prompt legal scholars to reconceptualise the role of the nation state in promulgating legal norms, from viewing modern societies and legal systems as relatively closed-off, impervious entities that can be adequately studied in isolation to understanding a wide range of 'legalities' that affect societies' relations

[33] Robert O'Brien and Marc Williams, *Global Political Economy* (3rd edn, Basingstoke: Palgrave MacMillan, 2010), 425.

[34] I disagree that globalisation cannot be used as an analytically useful concept. However, the concept should not replace searching analysis of the structures of global integration. For a counterargument see Frederick Cooper, 'What Is the Concept of Globalization Good For? An African Historian's Perspective' (2001) 100 *Afr.Aff.*, 189.

[35] Silvia Fazio, *The Harmonization of International Commercial Law* (Alphen aan den Rhine: Kluwer Law International, 2007), 2.

[36] There is a large and growing body of literature on this subject. See Saskia Sassen, *Globalization and Its Discontents* (New York: New Press, 1998), xxvii; and Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge University Press, 1996), 4. For a good overview of the debate see Stephen Gill and David Law, 'Global Hegemony and the Structural Power of Capital' in Stephen Gill (ed.) *Gramsci: Historical Materialism and International Relations* (Cambridge University Press, 1993), 279–80.

[37] Saskia Sassen, *A Sociology of Globalization* (New York: W.W. Norton & Co, 2007), 51.

both internally and externally.[38] If one takes stock of the legal reality of daily life, then the impact of a wide range of normative influences on our internal legal relations becomes apparent. Consider, for example, the impact of European Union law, the European Court of Human Rights, transnational religious law (e.g. sharia) or international standards such as the Basel capital adequacy requirements (CARs).[39]

Another aspect of the globalised legal environment is the proliferation of official and unofficial legal orders in any given polity. Known theoretically as legal pluralism, the concept describes a situation in which two or more bodies of law coexist in the same social field.[40] The concept originated from studies of hybrid legal systems created by European colonisation as discussed above. European countries superimposed their state-based law on native legal systems, resulting in a situation in which different bodies of law were available for different population groups.[41]

From the 1970s, the concept has been used to analyse non-colonised industrial states. In this context it is used to examine relations between dominant and subordinate groups, such as ethnic, cultural and religious minorities, as well as unofficial normative orders[42] in institutional and social networks.[43] Contemporary views of legal pluralism see the interaction of highly complex normative orders in virtually every society and social field. As a result, the focus of scholars of legal pluralism has shifted from the effect that law had on society, and vice versa, towards the interaction of highly complex official and unofficial normative orders in the same social field.[44]

Importantly, the interaction of social fields, which comprise the analytical object of all legal systems, introduces the powerful insight that the 'semiautonomous social field is one that can generate rules and customs and symbols internally, but that … is also vulnerable to rules and

[38] William Twining, *Globalisation and Legal Theory* (London: Butterworths, 2000), 51. See also Boaventurade Sousa Santos, *Toward a New Common Sense* (New York: Routledge, 1995), 385.

[39] William Twining (n 38) 51.

[40] Gordon R. Woodman (n 6) 10.

[41] Sally Engle Merry, 'Legal Pluralism' (1998) 22 *Law.Soc.Rev.*, 869, 870.

[42] The boundary between normative orders that can and cannot be called law has not been decided and will not be attempted in this book. The problem persists because of the great diversity amongst normative orders and the particular social fields in which they are present. The normative orderings examined in this book are relatively uncontroversial in that Islamic law is generally accepted as 'law', and other legal systems are either state-based or globally accepted as normative standards, i.e. Basel CARs.

[43] Sally Engle Merry (n 41) 872.

[44] *Ibid*., 873.

decisions, and other forces emanating from the larger world by which it is surrounded'.[45] Social fields such as a country's political system, economy, culture and traditions, are not confined by impermeable boundaries. Local, national and global normative orders interact with each other simultaneously. Cultures or social orders are never impervious or sealed off from outside forces. They are dynamically evolving sub-systems which interact with other referents in highly complex and heterogeneous ways;[46] and which may come to mimic, resemble or define themselves in opposition to each other.

Global legal pluralism is not merely a legal or even a political phenomenon. It results from the collision between all spheres and practices of our global society. These collisions originate in the contradictions between 'society-wide institutionalised rationalities',[47] which are both structural and ideological.[48] Legal pluralists view the resulting fragmentation of global law as giving rise to innumerable heterogeneous legal orders, a so-called 'poly-contextualisation of the law'.[49] Arguably, this view overemphasises growing diversity in global law by underestimating the role of power dynamics and the ways in which leading states exercise regulatory power. Structure and mechanisms of power can be understood as denoting a relationship between agents in which modes of action act indirectly upon others and their actions in an ongoing process.[50]

The structure and regulation of the global economy is powered by the most dominant region in the world, namely the North Atlantic region comprising the United States, the European Union and Canada.[51] The economy of the North Atlantic region is the largest and wealthiest market in the world, accounting for more than 50 per cent of world Gross

[45] *Ibid*., 878. The concept of semi-autonomous spaces was first conceived by Sally Falk Moore, *Law as Process* (London: Routledge & Kegan Paul, 1978).
[46] William Twining (n 38) 85. See also Boaventura de Sousa Santos (n 38) 270.
[47] Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Mich.J.Int'l L.*, 1004.
[48] Terence C. Halliday and Bruce G. Carruthers, 'The Recursivity of Law: Global Norm Making and National Law-making in the Globalization of Corporate Insolvency Regimes' (2007) 112 *Am.J.Soc.*, 1189.
[49] Andreas Fischer-Lescano and Gunther Teubner (n 47) 1007–8.
[50] For an in-depth examination of power see Michel Foucault, 'The Subject and Power' (1982) 8 *Crit. Inq.* 777.
[51] Globalisation is also attributed to the early expansion of European states across the globe including early European settlement and colonisation patterns. See Katherine Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), 40.

Domestic Product (GDP).[52] This region dominates the single most important force powering the globalisation of the economy: foreign direct investment (FDI) in the form of global capital markets and cross-border mergers and acquisitions. The region accounts for 57 per cent of the inward stock of FDI and a staggering 71 per cent of the outward stock of FDI. Importantly, countries comprising the region have invested a great portion of that stock in each other's economies.[53] With some exceptions for the volume of capital resources available to Japan and China's holdings of US dollars, the North Atlantic region vastly outweighs other major regions in these economic processes.[54]

North Atlantic economic predominance has created strong global forces for legal harmonisation in financial markets, which mirrors the financial standards and best practices developed in the leading financial centres (New York and London). In the area of financial services law, North Atlantic economic predominance delimits legal diversity to the neoliberal market paradigm.[55] However, the harmonisation of legal standards and best practices is more than just a functional requirement of capitalism. Market actors and government authorities assign qualitative meanings to economic processes (regulation, taxation, social welfare systems) and states' adoption of particular neoliberal policy measures is affected by this subjectivity. The range of financial market activities examined in this book underscores a diverse set of qualitative policy responses to the global capital of Islamic finance. Such responses, however, originate from within the neoliberal economic paradigm, which circumscribes the choices available to market actors.

A legal pluralistic perspective of global law differs from traditional comparative law in the sense that it is not concerned with locating the functional equivalent of different legal orders, despite vast differences in

[52] Daniel S. Hamilton and Joseph P. Quinlan, *The Transatlantic Economy 2013*, vol I (Washington, DC: Paul H. Nitze School of Advanced International Studies, 2013) v.

[53] *Ibid*.

[54] Saskia Sassen (n 36) 60.

[55] Neoliberal theory is a strongly law-centred economic paradigm in which an identifiable set of laws, regulations, best practices and institutions are thought to constitute an optimal strategy for economic development and prosperity. The implementation of these laws, best practices and institutional reform strategies are designed to enable private entrepreneurial activity and investment, the engine of economic growth. State intervention must be highly circumscribed if growth is not to be impeded. See Kerry Rittich, *Recharacterizing Restructuring: Law, Distribution and Gender in Market Reform* (The Hague: Kluwer Law International, 2002) 30. Chapter 4 deals with the nature of the neoliberal global economy in greater detail.